BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES L. JONES	)	
Claimant	)	
	)	
VS.	)	
	)	
WHEATLAND SUBS, d/b/a MR. GOODCENT'S SUB	)	
Respondent	)	Docket No. 1,013,704
	)	
AND	)	
	)	
HAWKEYE SECURITY INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the July 29, 2003 Award by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on August 19, 2005.

APPEARANCES

Dennis L. Phelps, of Wichita, Kansas, appeared for the claimant. Janell Jenkins Foster, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. Also, during oral argument, the Board requested that respondent provide more detailed information concerning the weeks it paid temporary total and temporary partial disability compensation and the amounts paid for those weeks. Claimant and respondent produced a joint letter dated September 1, 2005, with the additional information, and that letter will be considered as part of the record by stipulation of the parties.

ISSUES

The ALJ awarded claimant a 73 percent work disability based upon the average of a 46 percent task loss and claimant's actual 100 percent wage loss. The respondent contends the ALJ erred in finding that claimant made a good faith effort to become re-employed. Respondent requests that the Board impute a post-injury wage of $9 per hour to claimant based upon the testimony of Karen Terrill. This would give claimant a 0 percent wage loss and thereby limit his permanent partial disability compensation to his percentage of functional impairment, which Dr. John Estivo rated as 10 percent. In the alternative, respondent requests the Board impute a wage of $7.75 per hour (an average of the wage earning ability opinion given by Ms. Terrill and that testified to by Jerry Hardin), which would result in a wage loss of 10.5 percent, which, when averaged with the task loss of 46 percent, results in a permanent partial work disability of 28.3 percent.

Conversely, claimant argues that he made a good-faith effort to find work within the bounds of his permanent restrictions, coupled with his age, education and work experience. In his brief to the Board, claimant contends the ALJ used an incorrect average weekly wage to calculate the award. However, during oral argument to the Board, claimant withdrew his objection to the manner in which the ALJ calculated the pre-injury gross average weekly wage. Likewise, respondent had no objection to the average weekly wage found by the ALJ. Accordingly, the Board will affirm the ALJ's determination that claimant's gross average weekly wage, including tips, totaled $346.29 and that the compensation rate is $230.87. Based upon the compensation rate of $230.87, the parties admit that there was an underpayment of temporary disability compensation. The Stipulation dated September 1, 2005, contains an agreed amount for the underpayment of temporary total disability compensation. Unfortunately, it does not contain an agreed amount by which the temporary partial disability compensation was underpaid. Neither party disputes the 10 percent functional impairment rating nor the 46 percent task loss opinion given by Dr. Estivo and adopted by the ALJ. Accordingly, those findings are also affirmed by the Board.

Except for the underpayment of temporary disability compensation, claimant asks for the ALJ's Award to be affirmed. But if the Board should find that claimant failed to make a good faith job search effort, then claimant argues the opinion of his vocational expert, Jerry Hardin, that his post accident wage earning ability is $7 per hour or $280 per week, is the most credible.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant is a 76 year old man with a 10th grade education who was working for respondent to supplement his social security retirement benefit payments. Claimant was

hired as a part-time employee making $9 per hour with no fringe benefits. Claimant's job duties included opening the store, washing trays, wiping down tables, slicing bread, unwrapping meat and making deliveries. Claimant testified that at the time of his injury, he was making $9 an hour plus $1.50 for every delivery he made. He testified he made an average of $75 a week in cash as additional compensation for the delivery work.

On July 29, 2003, while moving 40-pound boxes of frozen bread from one section of a freezer to another, claimant twisted his back and felt a sharp pain going down his leg. Claimant reported his injury to the manager on duty at the time and continued to work his shift. Claimant returned to work the day after the accident wearing a belt/brace under his shirt, which he showed to Chris Unrein, respondent's co-owner.

Claimant first sought treatment from a chiropractor and then, on August 29, 2003, was seen by his family doctor, Dr. Todd Miller. Claimant saw Dr. Miller three or four times. Dr. Miller recommended that claimant see a neurosurgeon. Respondent instead directed claimant to be seen by John P. Estivo, D.O., who is a board certified orthopedic surgeon.

Dr. Estivo first treated claimant on September 29, 2003. Claimant complained of pain down his right leg. At the time Dr. Estivo saw claimant, claimant had received two epidural injections and undergone some physical therapy. Dr. Estivo recommended continued physical therapy, prescribed anti-inflammatory medication and placed claimant on work restrictions. Claimant was not to lift more than 10 pounds and was to limit his bending, stooping, and twisting to no more than one-third of a full day.

In October 2003, Dr. Estivo restricted claimant to seated work only. Respondent provided claimant with a stool and allowed him to sit on the stool and answer the telephone. Claimant's work hours were cut, and claimant only worked two days a week for two and one/half hours a day. About three to four weeks after claimant was provided the stool, respondent reduced claimant's salary from $9 per hour to $7 per hour.

Claimant had a third epidural injection in October 2003 with no relief. Dr. Estivo recommended further testing, including a myelogram CT scan and a NCT/EMG of the lower extremities. The myelogram CT scan showed a bulging disc at L4, L5 but no conclusive evidence of nerve root impingement. Results of the NCT/EMG showed a mild, chronic nerve irritation but no acute abnormalities. There were no signs of radiculopathy. After reviewing the results of the testing, Dr. Estivo diagnosed claimant with lumbar sprain.

In January 2004, Mr. Unrein told claimant he could no longer provide accommodated part-time work for claimant and claimant was removed from respondent's work schedule. Mr. Unrein testified that claimant is still considered an employee of respondent, but respondent cannot accommodate claimant's current work restrictions.

Dr. Estivo last saw claimant on February 4, 2004, at which time claimant still complained of numbness in his right anterior thigh. Dr. Estivo recommended continuance

of physical therapy. Dr. Estivo found claimant was at maximum medical improvement and assigned claimant an impairment rating of 10 percent based on the AMA *Guides*[1] for lumbar radiculopathy. Claimant was released from care on February 4, 2004, with permanent work restrictions of no more than 40 pounds lifting and limit bending, stooping and twisting to no more than one-third of a full workday.

On February 4, 2004, after claimant's release from treatment by Dr. Estivo, claimant's final work restrictions were faxed to respondent. Claimant heard nothing from respondent concerning offering him any accommodated work, nor did claimant contact respondent about returning to work. But claimant immediately began seeking other work. Claimant registered with job service as well as at temporary service agencies. He testified he looked for work almost every day and, in addition, he made in-person contacts to at least three businesses a week. He usually left his name and phone number with businesses, and if a business gave him an application, he filled it out. He has not received any job offers since being released from treatment by Dr. Estivo. Although claimant said it was not a complete list of everywhere he looked for work, claimant provided a list that showed a total of 46 contacts over a period of 25 weeks. The list also showed that he completed only two written employment applications.

Jerry Hardin, a human resource consultant, interviewed claimant on April 6, 2004. Claimant filled out a form giving his personal information, education, training, past work experiences, injury, and doctors' restrictions; claimant also filled out a task performance capacity assessment sheet. Mr. Hardin's report showed claimant could expect to make up to $7 per hour or $280 a week, post injury.

Karen Terrill, respondent's vocational expert, likewise prepared a list of job tasks based upon claimant's 15-year job history. In addition, her report suggests claimant could anticipate earning $8-$9 per hour.

When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly**

[1]American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

> **wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

The Act neither imposes an affirmative duty upon the employer to offer accommodated work nor does it impose an affirmative duty upon the employee to request accommodated work. Whether claimant requested accommodated work from an employer is just one factor in determining whether the claimant made a good faith attempt to obtain appropriate work.[4]

If claimant refuses to accept or even attempt to perform reasonably offered accommodated work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. Even if accommodated work is not offered, claimant still must show he made a good faith effort to find employment. If claimant did not make a good faith effort, a wage will be imputed to claimant based on the evidence in the record as to claimant's earning ability.[5]

---

[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001); *Oliver v. Boeing Company*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[5] *Copeland, supra* note 3 at 320.

In this case, claimant did not refuse accommodated work after his accident. To the contrary, claimant worked all of the hours of accommodated work that respondent offered him until he was told by respondent that accommodated work could no longer be provided. And claimant did not show a lack of good faith by not returning to respondent after he was given final restrictions. Those restrictions were provided to respondent, so respondent was aware of claimant's release and what his restrictions were. Claimant had already been told that accommodated work was not available. Respondent never contacted claimant to advise him otherwise. Furthermore, the parties have agreed that respondent was unable to accommodate claimant's permanent work restrictions.[6]

Given claimant's restrictions, his age, limited education and few transferrable job skills, the Board finds claimant's job search efforts were reasonable and were made in good faith. Accordingly, his actual post-injury wages should be used to calculate his wage loss. When claimant's actual 100 percent wage loss is averaged with his 46 percent task loss, his work disability is 73 percent.

Claimant argues that he is entitled to additional temporary total and temporary partial disability benefits. At the regular hearing, the following stipulation was made:

> THE COURT: Thank you, Mr. Phelps. Respondent has paid temporary total compensation to claimant in the amount of $1,653.48 which represents $183.72 paid for 21.36 weeks. In addition, temporary partial benefits have been paid in the total amount of $2,271.35. Did I read that correctly, gentlemen?
>
> MR. STREIT: [Respondent's Attorney]: Yes.[7]

In his submission letter to the ALJ, claimant stated:

> Claimant was paid a total of $3,924.83 in temporary total ($1,653.48) and temporary partial benefits ($2,271.35) based on an incorrect benefit rate (utilized by respondent) of $183.00 per week. This would compute to total weekly benefits of 21.45 weeks. For those 21.45 weeks, an underpayment of $1,430.93 ($249.71 - 183 = $66.71 x 21.45) is owed claimant and should be paid forthwith.[8]

In the joint letter to the Board signed by both the attorney for respondent and the attorney for claimant, the parties agree that "the correct compensation rate is $230.87 per

---

[6] *See Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 59 P.3d 352 (2002).

[7] R.H. Trans. at 7.

[8] Claimant's submission letter (filed Mar. 2, 2005) at 12.

week. $230.87 x 9.14 weeks = $2,110.15. Therefore, there has been an underpayment in temporary total disability benefits of $430.40."[9]

The joint letter sets out no agreement concerning the amount of the underpayment of temporary partial disability benefits. The Board notes that both the transcript of the Regular Hearing and the claimant's submission letter set out temporary partial disability benefits were paid in the amount of $2,271.35. The joint letter from the parties shows the amount of temporary partial disability payments paid to be $2,288.63. The last entry in this list was a payment of $17.28 for a period from 1-2 to 1-27, which is the difference between $2,271.35 and $2,288.63. However, there is no explanation of what this payment was, and the Board has simply added this $17.28 to the amount of temporary partial disability benefits paid to claimant. Using the table included in the joint letter from the parties, the Board has calculated the correct amount of temporary partial disability benefits due to claimant to be $2,809.46 and finds there has been an underpayment in temporary partial disability benefits of $520.83.

For award calculation purposes, the temporary partial disability payments are converted to the equivalent number of weeks of temporary total disability by dividing the amount of temporary partial disability benefits claimant is entitled to be paid, $2,809.46, by the computation rate of $230.87, which results in 12.17 weeks. Adding the 9.14 weeks temporary total disability was paid, this computes to the equivalent of 21.31 weeks of temporary total disability benefits.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Barnes dated March 10, 2005, should be modified to correct the award computation, but is otherwise affirmed.

The claimant is entitled to 21.31 weeks of temporary total disability compensation at the rate of $230.87 per week or $4,919.84 followed by 298.34 weeks of permanent partial disability compensation at the rate of $230.87 per week or $68,877.76 for a 73% work disability, making a total award of $73,797.60.

As of December 12, 2005 there would be due and owing to the claimant 21.31 weeks of temporary total disability compensation at the rate of $230.87 per week in the sum of $4,919.84 plus 102.55 weeks of permanent partial disability compensation at the rate of $230.87 per week in the sum of $23,675.72 for a total due and owing of $28,595.56, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $45,202.04 shall be paid at the rate of $230.87 per week for 195.79 weeks or until further order of the Director.

---

[9] Joint letter to the Board (Sept. 1, 2005) at 3.

IT IS SO ORDERED.

Dated this _____ day of December, 2005.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant
Janell Jenkins Foster, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director